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In the Supreme Court

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United States

OCTOBER TERM, 1993

PRISCILLA M. GARCIA, MARICELA BUITRAGO, and
LOCAL 115,
UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO,
Petitioners,

VS.

SPUN STEAK COMPANY,
A California Corporation,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in striking down a well-reasoned, long-standing, and consistently applied EEOC Guideline on speak-English-only rules by substituting its policy views for the EEOC's expertise and experience?

2. Did the Ninth Circuit err in holding that one's ability to comply with a discriminatory term or condition of employment forecloses a claim under Title VII?

3. Did the Ninth Circuit err in light of Harris v. Forklift Systems in holding that a plant-wide speak-English-only rule can never create a hostile working environment absent an accompanying pattern of national origin discrimination or draconian enforcement?

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Petitioners Priscilla M. Garcia, Maricela Buitrago, and Local 115, United Food and Commercial Workers International Union, AFL-CIO, respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, and the dissent therefrom of Circuit Judge Robert Boochever, is reported at Garcia, et al. v. Spun Steak Co. ("Spun Steak"), 998 F.2d 1480 (9th Cir. 1993) and reproduced in Appendix A, infra. Petitioners sought rehearing en banc. Over Judge Boochever's dissent, the panel denied the petition. The full court was advised of the suggestion for rehearing on en banc, but the matter failed to receive a majority of the votes of the non recused active judges. Circuit Judge Stephen Reinhardt dissented from the denial of rehearing en banc. The orders denying the petition and the dissent therefrom, filed October 29, 1993, are reported at Spun Steak, No. 91-16733, slip op. 14479, 1993 U.S. App. LEXIS 33530 (9th Cir. 1993) and are reproduced in Appendix B, infra. The unpublished order and judgment granting summary judgment to petitioners in the United States District Court for the Northern District of California (Schnacke, Robert H., J.) are reproduced in Appendix C, infra.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit by writ of certiorari is invoked under 28 U.S.C. § 1254(1). On October 29, 1993, the Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc of its opinion filed July 16, 1993, which reversed an order of the United States District Court for the Northern District of California granting petitioners' motion for summary judgment. This petition was timely filed within ninety days of that date as required by 28 U.S.C. § 2101(c); Sup. Ct. R. 12, 13.

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, and the Guidelines on Discrimination Because Of National Origin of the Equal Employment Opportunity Commission, 29 C.F.R. §§ 1606.1-1606.8, are reproduced in relevant parts in Appendix D, infra.

STATEMENT OF THE CASE

A. How the Federal Question Was Presented.

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., and under 28 U.S.C. § 1331.

B. Statement of Facts.

Priscilla M. Garcia worked for 19 years as a production line worker for Spun Steak Company ("Spun"), a meat processing firm located in South San Francisco, California. Maricela Buitrago has worked for Spun for nearly 10 years, also as a production line worker. As production line workers, Garcia and Buitrago stand before a conveyor belt, remove poultry or other meat products from the belt and place the product into cases or trays for resale. Their work is done individually and not in teams. They have no contact with the public.

Local 115 of the United Food and Commercial Workers International Union, AFL-CIO ("Local 115"),[1] is the collective bargaining agent for Garcia, Buitrago, and the other production line workers at Spun.

Spun employs approximately 30 workers, the majority of whom are Latino and Spanish-speaking. Virtually all of the Spanish speakers are Latino. Some speak only Spanish. While many are bilingual in Spanish and English, Spanish is the primary native language for most, like Buitrago.

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[1] Since the filing of this action, Local 115 has been redesignated as Local 101.

Until the speak English-only rule at issue was imposed by Spun, Latino employees freely spoke Spanish to their co-workers during work hours. Spun concedes that no employee has ever been injured at its plant because Spanish was spoken. Nor is there any documented record of a decrease in worker productivity as a result of employees speaking Spanish.

The use of the Spanish language amongst Spun's Latino workers has both practical and subjective importance. Garcia is bilingual in Spanish and English. Buitrago is also bilingual, but is dominant in Spanish and is more proficient in her native Spanish than in English. Buitrago explained the importance of her native language:

> I am of Salvadoran national origin. My primary language is Spanish. I am able to converse in English as well; however, I am more proficient in Spanish. The ability to speak Spanish is an important part of my ethnic and cultural identity.

Garcia explained that "depending upon the people with whom I am working, I will either use English or Spanish, whichever is more efficient to communicate with them until the problem is resolved. Most of the conversation that occurs is of a casual, non-work-related nature in both English and Spanish."

On October 2, 1990, Spun imposed a plant-wide policy requiring all of its workers to speak only English while at work. The rule was purportedly imposed because three employees had accused Garcia and Buitrago of making offensive remarks about them in Spanish (as well as in English).[2]

At the same time, Spun initiated a policy prohibiting the use of offensive speech at work (in any language). Significantly,

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[2] Ironically, these allegations arose in the course of an investigation of a claim of sexual harassment made by Buitrago. Buitrago complained to the owner about the sexually offensive conduct of a fellow employee. In response, the employee accused Buitrago of calling him ethnically offensive names in English and Spanish. Rather than further investigating the claim of sexual harassment, the company conducted an investigation into the allegations of offensive speech. Two or three other employees thereupon accused Buitrago of making other offensive remarks.

the latter policy proved effective; it has not been violated since its issuance. In addition, Spun physically separated Garcia and Buitrago in their work assignments, thus minimizing conversation between them while on duty. Despite the effectiveness of these narrowly tailored measures, Spun insisted on the English-only rule, a rule which applied to all conversations by all employees irrespective of the content of the conversation.

In the months following, Garcia and Buitrago were formally reprimanded on several occasions for speaking Spanish to other co-workers. Buitrago described an instance when the rule was enforced:

> On November 30, 1990, a production problem occurred further up the line. When the steaks reached our area, they were stuck together and could not be packaged in that form. My coworkers and I discussed the problem in Spanish. At that time, Kenneth Bertelsen [the president of Spun and one of its owners] yelled at me in front of my coworkers and chastised me for using Spanish. When I complained that his treatment was unfair, he jabbed at me with his finger and told me to "go back to your own country" if I wanted to speak Spanish. ...

Garcia described another incident:

> On June 5, 1991, the day prior to the EEOC's scheduled visit, Kenneth Bertelsen reprimanded me for using Spanish in a casual conversation with a co-worker, Connie Salazar, whose English ability is very limited. He yelled at me that "this is my house, and I only want English here," causing me to feel nervous and stressed.

On May 6, 1991, Garcia, Buitrago, and Local 115 filed charges of national origin discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC subsequently found there was reasonable cause to believe that Spun's English-only policy and retaliatory actions against Garcia

and Buitrago violated Title VII of the Civil Rights Act of 1964. Spun refused to conciliate the charges.

C. The Proceedings Below.

On June 26, 1991, Garcia, Buitrago and Local 115 filed a complaint in the U.S. District Court alleging, inter alia, that Spun's English-only policy constituted national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 under disparate impact theory.[3]

Plaintiffs relied in the first instance upon § 1606.7 of the EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1, et seq. to establish their prima facie case. Under § 1606.7, entitled "Speak-English-only rules" (the "Guideline"), a rule requiring that employees speak only in English must be shown by the employer to be justified by business necessity.[4] The Guideline, in effect, presumes that a speak English-only rule – by prohibiting employees from speaking their primary language or the language they speak most comfortably, and thereby creating an atmosphere of inferiority, isolation and intimidation – constitutes a burdensome term and condition of employment which has a disparate adverse impact upon national

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[3] The complaint also alleged sexual harassment of Buitrago, various pendent state claims, including a claim of employment discrimination on the basis of national origin under cognate provisions of California state law, and various tort claims. The District Court refused to assert pendent jurisdiction over the state tort law claims, and dismissed without prejudice Buitrago's sexual harassment claim.

[4] Section 1606.7(a) states, "A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it." Section 1606.7(b) states, "An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity."

origin minorities.

Plaintiffs additionally argued that irrespective of the Guideline, Spun's English-only rule in fact had an adverse impact upon its Latino workers. Plaintiffs presented percipient witness testimony and expert evidence that the rule impaired expression and communication between Latino employees whose native and dominant language is Spanish, as well as that of those who are fully bilingual. The evidence also described the importance of language to ethnic and cultural identity, particularly within the Latino community.[5]

In response to plaintiffs' prima facie case, Spun argued the English-only rule was necessary to prevent offensive speech by Spanish speakers. This was despite the fact that the allegations of the misuse of Spanish concerned only two employees, that the allegedly offensive speech had taken place in English as well as Spanish, and that any problem was effectively remedied by the implementation of a rule prohibiting the use of offensive remarks in any language against co-workers. Spun also asserted that its English-only rule was necessary for safety reasons even though Spanish had been spoken for years without incident and production workers have little need to converse in teams. Spun presented no evidence that casual conversations between workers in their primary language creates a greater safety problem when that primary language is Spanish rather than English.

The parties filed cross-motions for summary judgment. On October 4, 1991, the District Court granted summary judgment in

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[5] Guadalupe Valdés, Professor of Education at the Graduate School of Education at the University of California, Berkeley, explained:

> [S]tudies of the relationship between Spanish language and ethnic identity among Hispanics have clearly shown that Hispanics view language as an intrinsic aspect of their ethnicity. Denying individuals from those communities the right to use their primary language or the native language of their ancestors deprives them of their right to affirm their culture, express their identity, and inevitably demeans their ethnic heritage.

Declaration of Guadalupe Valdés, Ph.D., in Opposition to Defendant's Motion for Summary Judgment, filed September 20, 1991 in Garcia, et al. v. Spun Steak Co. U.S.D.C., N.D. Cal., No. C-91-1949 RHS, p.3.

favor of plaintiffs, finding that Spun's English-only rule had a discriminatory impact upon Latino workers which could not be justified by business necessity, and thus violated Title VII. Describing the English-only rule as overbroad and unnecessary, the District Court likened it to "hitting a flea with a sledge hammer."

Spun timely filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. The EEOC filed an amicus curiae brief in support of Garcia, Buitrago and Local 115, as it did in the District Court, and participated in oral argument. The matter was argued and submitted on November 3, 1992. In its opinion on July 16, 1993, the Ninth Circuit, in a two-to-one decision, reversed the District Court's grant of summary judgment, and ordered that summary judgment be entered in defendant's favor except as to those employees who spoke no English.

Acknowledging that the effect of the rule was felt disproportionately by those of Hispanic origin, the Ninth Circuit held the policy had no "significant" adverse effect upon bilingual Hispanic employees, rejecting plaintiffs' prima facie showing as a matter of law. The court found that the English-only rule did not impair expression and communication, even by those whose primary language is Spanish, because bilingual employees with even minimal English proficiency "can readily comply with the English-only rule and still enjoy the privilege of speaking on the job, . . ." Spun Steak, 998 F.2d at 1487. According to the Court, the English-only rule "merely inconvenienced" bilingual employees. Spun Steak, 998 F.2d at 1488.

Furthermore, the Ninth Circuit overturned the Guideline, noting that deference is not afforded to the EEOC's "administrative construction of a statute where there are 'compelling indications that it is wrong.'" Spun Steak, 998 F.2d at 1489, quoting Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 94 (1973). However, unable to cite anything in the specific language of Title VII or legislative history constituting such a "compelling indication," the Ninth Circuit reasoned conclusorily that the Guideline's presumption of a disparate impact contravened the general balance struck by Congress between "preventing discrimination and preserving the independence of the employer." Spun Steak, 998 F.2d at 1490.

Judge Boochever dissented from the panel majority's rejection of the Guideline, preferring to defer to the EEOC's

expertise in its conclusion that English-only rules may "create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." Spun Steak, 998 F.2d at 1490 (Boochever, J., dissenting in part), quoting 29 C.F.R. § 1606.7(a).

On July 30, 1993, plaintiffs timely filed a petition for rehearing and suggestion for rehearing en banc. On October 29, 1993, the Ninth Circuit issued an order denying the petition for rehearing over Judge Boochever's dissent. The suggestion for rehearing en banc was also denied. Judge Reinhardt filed a lengthy dissent therefrom (see Appendix B), concluding that the decision

> disrupts the uniform national application of an important EEOC Guideline, drastically handicaps the agency's ability to adopt other Guidelines, distorts or ignores Ninth Circuit caselaw in a highly sensitive area, and allows two of its judges to substitute their policy views regarding the subject of national-origin discrimination for the EEOC's experienced, reasoned and expert judgment.

Garcia et al. v. Spun Steak, No. 91-16733, slip op. 14479, 14492-14493, 1993 U.S. App. LEXIS 33530 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc).

REASONS FOR GRANTING THE WRIT

Certiorari is warranted because of the Ninth Circuit's erroneous refusal, contrary to this Court's precedents, to defer to a longstanding Guideline of the EEOC relating to "speak-English-only" rules. This Court's guidance is also necessary to resolve the conflict between the circuits on the deference question -- a conflict which gave rise to the error in question -- and to ensure the effective administration of Title VII on an issue of growing national importance. Furthermore, the court below radically rewrites established Title VII jurisprudence so as to legitimate all employer practices, no matter how discriminatory, so long as an employee can "readily comply" therewith. Finally, this Court

should grant certiorari to correct the Ninth Circuit's misconception of "hostile working environment" analysis in light of Harris v. Forklift Systems, ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S REFUSAL TO DEFER TO A LONGSTANDING AND CONSISTENTLY APPLIED GUIDELINE OF THE EEOC CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. The Ninth Circuit Failed to Adhere to the Analysis of Administrative Deference Established By This Court.

It is axiomatic that guidelines of the EEOC "constitute 'the administrative interpretation of [Title VII] by the enforcing agency,' and consequently they are 'entitled to great deference.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975), quoting Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971). The standard relating to the degree of deference due has been stated variously by the Court. See, e.g., Espinoza v. Farah Mfg. Co. ("Espinoza"), 414 U.S. 86, 94 (1973) (EEOC guideline entitled to deference unless "there are compelling indications that it is wrong"); EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981) (particular deference due to contemporaneous and stable construction by EEOC); EEOC v. Commercial Office Products Co. ("Commercial Office Products"), 486 U.S. 107, 115 (1988) ("EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference"); EEOC v. Arabian American Oil Co. ("ARAMCO"), 499 U.S. 244, 257 (1991) (deference to EEOC interpretation depends upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those actors which give it power to persuade . . ."), quoting General Electric Co. v. Gilbert ("Gilbert"), 429 U.S. 125, 142 (1976).

In rejecting the Guideline herein, the Ninth Circuit failed to adhere to either of the court's most recent decisions on the subject, ARAMCO and Commercial Office Products. The panel majority disregarded virtually every factor articulated by this Court as germane to the analysis of deference to an EEOC Guideline. The court did not find that the Guideline conflicted with the plain language of Title VII,[6] nor did it follow a "long-standing principle of American law" supplying a rule of statutory construction contrary to the result reached by the EEOC. Cf. ARAMCO, 499 U.S. at 248. It did not find that the Guideline conflicted with specific Congressional intent on the subject as found in the legislative history or related statutes, as it conceded there was none.[7] Cf. Espinoza, supra, 414 U.S. at 91. Nor did it find that the position embodied in the Guideline was "inconsistent with earlier and later pronouncements" of the EEOC, or that the EEOC's consideration of the matter lacked "thoroughness". ARAMCO, supra, 499 U.S. at 257.

Instead, the Ninth Circuit simply stated that "Congress intended a balance be struck in preventing discrimination and preserving the independence of the employer," citing in support the general remark made on the House floor during the debate on Title VII by a single Representative that:

> management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.

Spun Steak, 998 F.2d at 1489-90 (Statement of William M. McCulloch, et al., H.R.Rep. No. 914, 88 Cong., 2d Sess (1964)). Based solely on this general remark -- hardly reflective of "an

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[6] It merely found that "[n]othing in the plain language of section 703(a)(1) [of Title VII] supports EEOC's English-only rule Guideline." Spun Steak, 998 F.2d at 1489.

[7] "Indeed, nowhere in the legislative history is there a discussion of English-only policies at all." Spun Steak, 998 F.2d at 1490.

obvious Congressional intent" to the contrary, Espinoza, 414 U.S. at 94 -- the Ninth Circuit leapt to the conclusory holding that the Guideline's presumption of adverse impact somehow contravenes that balance.

This Court has never relied on such grossly general, let alone nonexistent, expressions of legislative intent to reject wholesale an established Guideline of the EEOC. In contrast to the careful treatment of deference that has characterized this Court's decisions, the Ninth Circuit's analysis is wholly standardless, anchored to nothing in the specific language, structure, or legislative history of Title VII.[8] The panel majority's reasoning gives carte blanche to any federal court to reject any guideline of the EEOC -- or that of any other agency -- through the exercise of undisciplined judicial fiat.

B. Under Either ARAMCO or Commercial Office Products, The English-Only Guideline Is Entitled To Deference.

Had the Ninth Circuit properly applied this Court's most recent pronouncements in either ARAMCO or Commercial Office Products, it would have deferred to the English-only Guideline.

1. The Guideline Is Entitled To Deference Under ARAMCO.

The Guideline more than satisfies the test for deference under the criteria articulated in ARAMCO. First, there is great "thoroughness evident in its consideration." ARAMCO, supra, 499 U.S. at 257. In 1980, the EEOC engaged in a comprehensive review and revision of its Guidelines on Discrimination Because of National Origin. As part of that revision, the proposed Guideline on Speak-English-only rules was subject to public notice and

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[8] Its cramped interpretation of Title VII contravenes the well-established principle that Title VII "must be construed liberally in order to effect the broad remedial purpose of Congress 'to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.'" Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1978), quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

comment prior to its issuance. 45 Fed. Reg. 85632 (December 29, 1980) (to be codified at 29 C.F.R. pt. 1606). During the comment period, the Commission received and considered approximately 250 comments from individuals, civil rights organizations, business associations, educational institutions, and public and private employers. Many of them focused specifically on the English-only Guideline. Ibid.

The thoroughness of the EEOC's consideration of the issue is underscored by the fact that, subsequent to its issuance of the Guideline, then-EEOC Chairman Clarence Thomas issued a comprehensive compliance manual to facilitate its enforcement. See "EEOC Compliance Manual, Vol. II, EEOC Order 915: Section 623, Speak-English Only Rules and Other Language Policies" (attached as Exhibit C to Appellees' Brief to the Ninth Circuit). The Compliance Manual provided thorough analysis as to the particular circumstances under which English-only rules are permissible.

Second, the Guideline is "consisten[t] with earlier and later pronouncements." Since 1967, shortly after the passage of Title VII, the EEOC has taken the position in its administrative decisions, as well as its Guideline and Compliance Manual, that English-only rules have a discriminatory impact on national origin minorities and thus must be justified by business necessity.[9]

Finally, the EEOC's reasoning that English-only rules in particular have a disparate adverse impact upon national origin minorities is eminently "valid." ARAMCO, supra, 499 U.S. at 257. English-only rules disproportionately affect national origin

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[9] In an unreported decision in 1967, the Commission found that such rules may constitute a form of national origin discrimination. EEOC Dec. AU7-2-88 (1967) (unreported). In a subsequent reported decision, the Commission found an English-only rule "has the obvious and clear effect of denying Respondent's Spanish surnamed American employees (as well as other minority groups, if any there be), who converse in a familiar language with which they are most comfortable," and thus violates Title VII unless a business necessity is shown for the policy. EEOC Dec. 71-446 (CCH) Para. 6173, 2 FEP Cases 1127, 1128 (1970). The Commission's position that English-only rules have a discriminatory impact upon national origin minority workers was reaffirmed in subsequent decisions. See EEOC Dec. 72-0281 (CCH) Para. 6293, 1971 EEOC LEXIS 8 (1971); EEOC Dec. 73-479, 1973 EEOC LEXIS 3, 41 (1973).

minorities.[10] Indeed, unlike many facially neutral devices challenged under disparate impact theory (such as the requirement of a high school diploma or a minimum height), English-only rules burden national origin minorities almost exclusively and thus arguably facially discriminate on the basis of national origin.[11]

The Guideline reasonably finds such rules are burdensome for two independently sufficient reasons. First, by definition, English-only rules disadvantage national origin minority workers by preventing them "from speaking their primary language or the language they speak most comfortably," as the EEOC properly found. 29 C.F.R. § 1606.7(a). It consigns these minorities to a second language in which they are less articulate, their vocabulary is limited, and their ability to express ideas, concepts, and feelings are significantly restricted. Fully bilingual individuals are also adversely affected.[12] In Hernandez v. New York, ___ U.S. ___, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), Justice Kennedy, writing for the Court, observed:

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[10] Latinos, for instance, comprise 97% of those individuals who usually speak Spanish. Perea, "Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English," 77 Minn. L. Rev. 269, 359 (1992). For Asian Americans the correlation between language and ethnicity is also very high. As of 1989, 72.5% of Chinese Americans speak a language other than English (presumably their native language) at home. Comparable figures for other Asian American groups are Cambodian (81.9%), Vietnamese (80.7%), Laotian (77.4%), Thai (72.5%), Korean (69.7%), Filipino (59.9%), Indian (55.3%), and Japanese (40.5%). Gall Research, Statistical Record of Asian Americans 128 (S. Gall & T. Gall eds., 1993).

[11] See Perea, supra, 77 Minn. L. Rev. at 357-360.

[12] Two languages together constitute the linguistic repertoire of bilinguals, and "code switching" (i.e. changing languages in the course of a conversation) has expressive value, occurring for instance to signal greater intimacy or reference to values associated to ethnic language, to reflect a change in role relationship with regard to one another, or as a metaphoric device by means of which a speaker gives emphasis to a particular segment of his/her speech. Declaration of Guadalupe Valdés, Ph.D., supra, pp. 3-4. Moreover, "[f]luent bilinguals often report having different personalities in their two languages, and studies have suggested that bilinguals show different responses in projective psychological tests . . . depending on which language is used." Snow, Catherine E. and Hakuta, Kenji, "The Costs of Monolingualism" in Crawford, ed., Language Loyalties: A Source Book on the Official English Controversy (1992), pp. 388-89.

> Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond.

Hernandez, 111 S.Ct at 1872.

Second, English-only rules tend to "create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." 29 C.F.R. § 1606.7(a). A rule prohibiting ethnic minority workers from conversing with their co-workers in their native tongue directly suppresses a fundamental aspect of ethnicity and national origin identity.

> Although an individual may learn English and become assimilated into American society, his primary language remains an important link to his ethnic culture and identity. The primary language not only conveys certain concepts, but is itself an affirmation of the culture.

Gutierrez v. Municipal Court ("Gutierrez") 838 F.2d 1031, 1039 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989) (citations omitted). As one commentator has noted: "Language is the lifeblood of every ethnic group. To economically and psychologically penalize a person for practicing his native tongue is to strike at the core of ethnicity." Comment, "Native-Born Acadians and the Equality Ideal," 46 La. L. Rev. 1151, 1167 (1986). The Guideline is particularly reasonable since a broad company-wide rule is "sweeping in nature and has a direct effect on the general atmosphere and environment of the workplace." Gutierrez, supra, 838 F.2d at 1041.

2. The Guideline Is Entitled To Deference Under Commercial Office Products.

The English-only Guideline constitutes a "reasonable" interpretation of "ambiguous" statutory language and is thus entitled to deference under Commercial Office Products, supra. The scope of Title VII's injunction against discrimination on the basis of "national origin"[13] is "sufficient[ly] ambigu[ous] . . . to warrant deference to the agency's construction." Commercial Office Products, 486 U.S. at 125 (O'Connor, J., concurring in part). National origin is often identified by a variety of traits such as surname, given name, cultural customs, or linguistic characteristics. Cf. Hernandez v. Texas, 347 U.S. 475, 480 n.12 (1954) (Spanish surname indicative of national origin).

This Court and other courts and commentators have specifically noted or assumed that language is a key identifier of national origin.[14] "The primary language of an individual is often

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[13] Congress left the term "national origin" undefined:

> The only direct definition given the phrase "national origin" is the following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: "It means the country from which you or your forebears came. . . . You may come from Poland, Czechoslovakia, England, France, or any other country." 110 Cong. Rec. 2549 (1964).

Espinoza, supra, 414 U.S. at 89. The term "national origin" was used infrequently prior to the adoption of Title VII. See Note, "A Trait-Based Approach to National Origin Claims Under Title VII," 94 Yale L. J. 1164, 1170 (1985).

[14] Cf. Lau v. Nichols, 414 U.S. 563 (1974) (interpreting Title VI's ban on national origin discrimination as encompassing discrimination on the basis of limited English proficiency); Hernandez v. New York, 111 S.Ct at 1872-73, 114 L.Ed.2d at 413) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis"); Espinoza, supra, 414 U.S. at 293-294 n.5 (in finding no evidence of discrimination against persons of Mexican national origin, this Court noted there was "no suggestion, for example, that the company refused to hire aliens of Mexican or Spanish-speaking background while hiring those of other national origins" (emphasis added)); Craig v. County of Los Angeles, 626 F.2d 659, 661 n.1 (9th Cir. 1980)

an essential national origin characteristic" (29 C.F.R. § 1606.7(a)). The EEOC's position that English-only rules which punish the use of that primary language fall within the purview of Title VII is not inconsistent with the plain language of the statute.

Nor is the Guideline inconsistent with the "unambiguously expressed intent of Congress." Chevron U.S.A. v. Natural Resources Defense Council ("Chevron"), 467 U.S. 837, 843 (1984). The Ninth Circuit correctly observed that "nowhere in the legislative history is there any discussion of English-only policies at all." Spun Steak, 998 F.2d at 1490. Since the EEOC's promulgation of § 1606.7 in 1980, Congress has amended Title VII on several occasions. Not once has Congress chosen to overrule or alter the EEOC's interpretation in respect to English-only rules. "[D]eference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." U.S. v. Rutherford, 442 U.S. 544, 554 (1979).

In fact, Congress has specifically endorsed the Guideline. In the congressional debate over the Civil Rights Act of 1991, Pub.L. No. 102-166, Sen. DeConcini expressed concern about "an increasing problem with non-job related discipline and termination of people for speaking languages other than English in the workplace." In response, Sen. Kennedy, co-author of the Civil Rights Act of 1991, assured Sen. DeConcini that the EEOC's Guideline addressed the situation, confirmed that § 1606.7 "has worked well during the past 11 years it has been in effect," and opined that it was consistent with Title VII as amended by the 1991 legislation. 137 Cong. Rec. S15489 (daily ed. Oct. 30, 1991) (remarks of Sens. DeConcini and Kennedy) (attached as Appendix E hereto).

(plaintiff class defined by district court as "Spanish-surnamed" or "Spanish language" persons); Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971), aff'd in part, rev'd in part, 459 F.2d 725 (1st Cir. 1972) (definition of class of "Spanish surnamed persons" encompassed those "whose primary language is Spanish"). See also Note, "A Trait-Based Approach to National Origin Claims Under Title VII, supra; Comment, "Native Born Acadians and the Equality Ideal," supra.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD OF DEFERENCE APPLICABLE TO THE EEOC.

Petitioners additionally urge this Court to grant certiorari to resolve a conflict between the circuits as to which of this Court's decisions should be applied in questions of deference to the EEOC Guidelines. The lack of clear guidance as to the appropriate standard, reflected in this inter-circuit conflict, was conducive to the Ninth Circuit's rejection of the Guideline based solely on its own tenuous extrapolation of the philosophy underlying Title VII.

In Gilbert, this Court held that deference due to an EEOC Guideline would depend "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . ." 429 U.S. at 142 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Eight years after Gilbert, however, the Court returned to a simple two-step method for judicial review of administrative agencies' interpretations of statutes they administer: Is the statute ambiguous, and if so, has the agency adopted a reasonable construction? Chevron, 467 U.S. at 842-43 (1984). In Commercial Office Products, this Court applied Chevron's analysis to the EEOC's administrative interpretations, stating "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." 486 U.S. at 115.

Nonetheless, in 1991, this Court again applied Gilbert in ARAMCO, rejecting EEOC's interpretation of Title VII without even mentioning Chevron or Commercial Office Products, much less purporting to modify them. As Justice Scalia observed, after ARAMCO, "the state of the law regarding deference to the EEOC is left unsettled" as between ARAMCO and Commercial Office Products. 499 U.S. at 260 (Scalia, J., concurring).

Since ARAMCO, the circuits have applied two different standards of deference to EEOC guidelines: (1) the "power to persuade" standard of ARAMCO; and (2) the "reasonable" standard of Commercial Office Products. The Fifth, Sixth, Seventh and Tenth Circuits have applied Chevron or Commercial

Office Products in deferring to EEOC interpretations. See Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 86 (1992); Rowe v. Sullivan, 967 F.2d 186, 194 (5th Cir. 1992); Philbin v. General Electric Capital Auto Lease, Inc., 929 F.2d 321, 324 (7th Cir. 1991); Crozier v. Howard, ___ F.3d ___, 1993 WL 492340 n.4 (10th Cir. 1993). The Ninth Circuit, on the other hand, has criticized the Sixth Circuit's failure to apply ARAMCO. Estate of Reynolds v. Martin, 985 F.2d 470, 476 n.5 (9th Cir. 1993). The Third Circuit has refused to defer to an EEOC regulation regarding time limitations under the Age Discrimination in Employment Act, relying on ARAMCO. Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1421 n.11 (3rd Cir. 1991). Cf. Reich v. Parker Fire Protection Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) (applying "power to persuade" standard rather than Chevron to "nonregulatory guidelines of the Secretary of Labor").

To further confuse matters, the Sixth Circuit has suggested that ARAMCO applies to "substantive" EEOC regulations whereas greater deference is due to "procedural" regulations. Jackson v. Richards Medical Co., 961 F.2d 575, 581 (6th Cir. 1992). The Seventh Circuit has suggested another distinction – that ARAMCO rather than Chevron applies "in an interpretation involving the very scope of an agency's authority" (United States v. 25 Cases, 942 F.2d 1179, 1182-83 (7th Cir. 1991)), a result seemingly inconsistent with Commercial Office Products.

In the context of the unsettled state of the law, and the resultant inter-circuit conflict described above, it is unsurprising that the panel majority below did not believe itself obliged to refer to this Court's recent statements on deference. In the absence of clear, definitive guidance on the deference issue, the decision below illustrates that the lower courts are in effect left free to pick and choose from a plethora of variously articulated standards drawn from over two decades, inviting situations in which the analysis of deference is – as was the case below – left virtually standardless. Cf. Miller v. Beneficial Management Corp., 977 F.2d 834, 843 (3d Cir. 1992) (applying Griggs v. Duke Power Co., supra, in deferring to EEOC regulation without referring to Commercial Office Products or ARAMCO).

Accordingly, this Court should grant certiorari in order to clarify and settle the question of deference to the EEOC, and to

secure uniformity and consistency of decision lacking in the lower courts, a situation made only worse by the Ninth Circuit's ill-conceived decision below. See e.g. Saxbe v. Washington Post Co., 417 U.S. 843, 846 (1974); Minnesota Mining Co. v. New Jersey Wood Co., 381 U.S. 311, 314 (1965).

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S REJECTION OF THE LONGSTANDING EEOC GUIDELINE ON SPEAK ENGLISH-ONLY RULES DISRUPTS EFFECTIVE ADMINISTRATION OF TITLE VII ON AN ISSUE OF GREAT AND GROWING IMPORTANCE.

A. The Guideline Addresses An Important National Issue Which Is Certain To Recur With Increasing Frequency.

The subject of the Guideline -- speak English-only rules -- is of great and growing importance. In rejecting the validity of the Guideline, the Ninth Circuit has needlessly deprived the courts of uniform guidance on their treatment at a time when such rules are increasingly prevalent.

National origin discrimination in the form of workplace language policies, of noted significance in 1980 when the EEOC promulgated § 1606.7,[15] is even more significant today as America's workforce becomes more ethnically and linguistically diverse. According to the 1990 Census, approximately 32 million U.S. residents over the age of five speak a foreign language at home. In California alone, one out of three residents over the age of five speaks a foreign language at home.[16] The number of

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[15] The Commission noted that a 1976 study revealed approximately 28 million persons in the United States (about 13% of the population) have non-English language background. 45 Fed. Reg. 85632, supra, at 85634.

[16] McLeod, "Census Finds Many Speak Foreign Language at Home," San Francisco Chronicle, p. A3 (April 28, 1993). See Population Division, Bureau of the Census, Pub. No. CPH-L-133, "Language Spoken at Home and Ability to Speak English for the United States, Regions and States" (1990).

residents who speak Spanish at home increased by 56% from 1980 to 1990. The number of Chinese speakers increased 109% during that same period.[17]

While no direct statistics are available as to the number of complaints filed with the EEOC about speak English-only rules specifically, claims of national origin discrimination in the workplace are increasing. The EEOC reports that 14,394 complaints of national origin discrimination were filed with the Commission in 1992, a jump of 30% over the number filed in 1989.[18] There is evidence that English-only rules are increasingly common.[19] Review by this Court is particularly warranted

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[17] Numbers and Needs, Ethnic and Linguistic Minorities in the United States, Vol. 3, No. 4, p.1 (July, 1993), citing William P. O'Hare, "America's Minorities – the Demographics of Diversity," Population Bulletin, Vol. 47, No. 4 (Washington, D.C.: Population Reference Bureau, Inc., Dec. 1992).

[18] Yang, "In Any Language, It's Unfair," Business Week, June 21, 1993, at 110-111.

[19] See, e.g., Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987); Saucedo v. Brothers Well Service, 464 F.Supp. 919 (S.D. Tex. 1979); Dimaranan v. Pomona Valley Hospital Medical Center, 775 F.Supp. 338 (C.D.Cal. 1991). See also "A Month of Rancor," Sacramento Bee, July 19, 1993, at A14; Sanchez, Howe, "Three Employees Allege Bias On Language; Bank Said to Have Issued Ban on Speaking Spanish," Washington Post, February 23, 1993, at B1; "Hispanic Rips English-only Hospital Policy," Houston Chronicle, July 3, 1992, at A44; Dawson, "English Only at Coffee Break," Calgary Herald, October 18, 1991, at A1; "Suit Challenges English-only Rule at Vista Firm," Los Angeles Times, August 23, 1991, at B7; "In Court," Los Angeles Times, September 24, 1990, at B4; "Foreign Languages – How Would You Say 'Good Law' in Tagalog?" Seattle Times, September 24, 1990, at A6; Perea, "Speaking Spanish Shouldn't Get You Fired," Legal Times, September 17, 1990, at 26; Mydans, "Pressure for English-Only Job Rules Stirring a Sharp Debate Across U.S." Los Angeles Times, June 18, 1990, at D2; "In Court: A Summary of Southern California-Related Business Litigation Developments During the Past Week," Los Angeles Times, June 18, 1990, at D2; "Salvation Army Worker Files Discrimination Suit," Washington Times, December 21, 1989, at B8; Nichols, "The English-Only Movement Legitimizes Attacks on Brotherhood and Tolerance," Los Angeles Times, February 19, 1989, Part 5 at 5; Ingwerson, "English-Only Laws: How Broad?" Christian Science Monitor, November 29, 1988, at 3. See generally Burleson, "Taco Bell Forms Policy on Language," The Californian Sept. 25, 1992, at 1; Yang, "In Any Language, It's Unfair," Business

because the question as to the validity of the English-only Guideline is likely to recur. See, e.g., Laing v. U.S., 423 U.S. 161, 167 (1976); U.S. v. Standard Oil Co., 332 U.S. 301, 302 n.2 (1947).

B. The Ninth Circuit's Rejection of the Guideline Will Substantially Impair the Ability of the EEOC To Enforce Title VII.

The Ninth Circuit's unprecedented rejection of the EEOC's long-standing policy on English-only rules seriously hinders the effective administration of Title VII on an issue of great and growing importance and thus warrants certiorari. See e.g. Rothensies v. Electric Battery Co., 329 U.S. 296 (1946). The decision undermines the clarity and guidance provided by the Guideline and implementing Compliance Manual, and disrupts national uniformity in the enforcement of Title VII.

The breadth of the Ninth Circuit's decision -- holding that English-only rules generally do not constitute even a prima facie case of discrimination, and thus obviating the need by employers to demonstrate a business justification for such rules -- is particularly debilitating. It places virtually all challenges to English-only rules beyond scrutiny, removing from the EEOC and the courts the ability to examine on a case-by-case basis the permissibility of English-only rules as measured against their business purpose. Cf. Saucedo v. Brothers Well Service, 464 F.Supp. 919 (S.D. Tex. 1979) (English-only rule on oil drilling rig permissible); EEOC Dec. 81-25, 27 FEP 1820 (1981) (English-only rule in tailor shop not justified); EEOC Dec. 83-7, 31 FEP 1861 (1983) (English-only rule applicable to refinery employees working in laboratory and processing areas while actually performing a job duty permissible).

Moreover, the Ninth Circuit's holding, that the EEOC can never presume a given practice has a disparate impact because

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Week, June 21, 1993, at 110-111; Henry, "Fighting Words," Los Angeles Times, June 10, 1990, at 10; Note, "English-only Rules and 'Innocent' Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII," 74 Minn. L. Rev. 387, 387-394 (1989).

Title VII requires that each prima facie case of discrimination be established factually in every case, cannot be confined to the Guideline. As Justice Reinhardt noted in his dissent from the Ninth Circuit's denial of rehearing en banc:

> The majority apparently believes that the question of the validity of a widespread discriminatory practice must be decided over and over again on a case by case basis in a private lawsuit each time a new employer adopts it.

Spun Steak, slip op. at 14487-88.

> Under the majority's unique approach, an EEOC Guideline stating, for example, that rules requiring employees to be at least six feet tall are presumed to have a disparate impact on women would be held invalid even though the Supreme Court had held that eight and weight requirements have a disparate impact on women and the factual or statistical issue is the same in all cases.

Spun Steak, slip op. at 14487 n.7.[20]

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[20] Preventing the EEOC from ever presuming a disparate impact (thereby shifting the burden to the employer to show a business justification for the challenged practice) is particularly detrimental to the enforcement of Title VII where, as here, the prima facie case turns on an analysis of subjective factors (e.g. whether such rules impose a cognizable burden and whether they create a hostile working environment) which less susceptible to proof on a case by case basis. Judge Boochever aptly observed in his dissent from the panel opinion:

> As the majority indicates, proof of such an effect of English-only rules [of creating a discriminatory working environment] requires analysis of subjective factors. It is hard to envision how the burden of proving such an effect would be met other than by conclusory self-serving statements of the Spanish-speaking employees or possibly by expert testimony of psychologists. The difficulty of meeting such a burden may well have been one of the reasons for the promulgation of the guideline. On the other hand, it should not be difficult for an employer to give specific reasons for

This Court has never held that the EEOC cannot presume a given practice has a disparate impact. For instance, the Court did not reject the EEOC's Guideline on pregnancy discrimination in Gilbert because it effectively presumed that denial of disability benefits for pregnancy constituted gender discrimination. Rather, this Court engaged in a detailed consideration of the "power to persuade" analysis pursuant to Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), and found that the EEOC's position had been inconsistent and conflicted with related statutes and regulations. See 429 U.S. at 140-143. Indeed, in Nashville Gas Co. v. Satty, 434 U.S. 136, 142 n.4 (1977), this Court subsequently upheld the EEOC Guideline which presumes that the denial of seniority rights arising out of pregnancy leaves constitutes gender discrimination.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S HOLDING THAT ONE CANNOT CLAIM DISCRIMINATION IF HE OR SHE CAN "READILY COMPLY" WITH AN OBJECTIONABLE TERM OR CONDITION IS AT ODDS WITH FUNDAMENTAL ANTI-DISCRIMINATION PRINCIPLES AND PROFOUNDLY LIMITS THE REACH OF TITLE VII.

Plaintiffs' prima facie showing of disparate impact was based in part upon the fact that Spun's English-only rule disproportionately burdened Latino workers by prohibiting them from speaking in the language in which they are most proficient and comfortable – their primary language, Spanish. As noted above, that burden also provided a rationale for the EEOC's English-only Guideline.

The Ninth Circuit rejected this rationale, finding that English-only rules as applied to bilingual employees (even employees who are far more proficient and comfortable in their primary language rather than in English) are not burdensome, but

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the policy, – such as the safety reasons advanced in this case.

Spun Steak, 998 F.2d at 1490 (Boochever, J., dissenting in part).

"merely inconvenience" those employees because they can "readily observe" the rule and "nonobservance is a matter of individual preference." Spun Steak, 998 F.2d at 1487 (quoting Garcia v. Gloor, 618 F.2d at 270). According to the Ninth Circuit, "Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class." Spun Steak, 998 F.2d at 1488.

The court's holding that one's ability to comply with an objectionable term or condition vitiates a claim of discrimination is totally at war with fundamental anti-discrimination principle, and represents a view which has never been countenanced by this Court. As Judge Reinhardt observed:

> This analysis demonstrates a remarkable insensitivity to the facts and history of discrimination. Whether or not the employees can readily comply with a discriminatory rule is by no means the measure of whether they suffer significant adverse consequences. Some of the most objectionable discriminatory rules are the least obtrusive in terms of one's ability to comply: being required to sit in the back of a bus, for example; or being relegated during one's law school career to a portion of the classroom dedicated to one's exclusive use. See McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851 (1950).

Garcia et al. v. Spun Steak Co., No. 91-16733, slip op. 14479, 14483 (9th Cir. 1993) (Reinhardt, J., dissenting from denial or rehearing en banc).

The Ninth Circuit's rationale finds no place in Title VII jurisprudence. Rules requiring women to wear uniforms (Carroll v. Talman Federal Savings & Loan Association of Chicago, 604 F.2d 1078 (7th Cir. 1979), cert. denied, 445 U.S. 929 (1980)) or sexually revealing outfits (EEOC v. Sage Realty Corp., 507 F.Supp. 599 (S.D.N.Y. 1981)), to abandon their unmarried name (Allen v. Lovejoy, 553 F.2d 522, 524 (6th Cir. 1977)), or not to wear eyeglasses (Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 443 (D.C. Cir. 1976)) are not immune under Title VII simply

because female employees can "readily comply" with the rule.[21]

Taken to its logical conclusion, a rule requiring employees to abandon Spanish-surnames or ethnic given names while at work, or requiring dark complected employees to eat in a separate cafeteria, or barring workers from joining particular ethnic organizations would be immune from scrutiny under Title VII simply because the individual employee could, as a practical matter, readily comply with the rule. The panel majority's focus on one's practical ability to comply misconceives the guiding principles of Title VII:

> Thus, the Spun Steak majority's emphasis on the practical effects of English-only rules is misplaced. Whether or not an individual is, in practice, capable of speaking only English is not the important consideration here by any means. What is far more important is the impact of the prohibition itself. As the EEOC correctly determined, being forbidden under penalty of discharge to speak one's native tongue generally has a pernicious effect on national origin minorities.

Garcia et al. v. Spun Steak Co., No. 91-16733, slip op. 14479, 14484 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc).

The Ninth Circuit's rationale will substantially undermine Title VII's enforcement against national origin discrimination in particular. Unlike gender or race discrimination, which are

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[21] The Ninth Circuit's rationale cannot be confined to disparate impact analysis. Under the court's reasoning, if the objectionable term or condition imposes a mere "inconvenience", there is no cognizable claim whether the "inconvenience falls regularly on a protected class" (i.e. disparate impact) or exclusively on a protected class (i.e. disparate treatment). Stated otherwise, the panel majority would uphold an employer's right to consciously and purposefully single out members of protected classes for adverse treatment as long as the objective burdens visited on those employees were merely an "inconvenience." In fact, the Ninth Circuit has applied the "readily comply" rationale to a disparate treatment claim in Jurado v. Eleven Fifty Corp. See Jurado, 813 F.2d at 1406, 1411 (9th Cir. 1987).

commonly based on obvious and immutable physical characteristics, discrimination on the basis of national origin typically is not based on physical traits. Rather, national origin minorities are identifiable by their surname, given name, cultural customs and clothing, associations, and/or language -- factors which in general are not immutable. See Note, "A Trait-Based Approach to National Origin Claims Under Title VII," 94 Yale L. J. 1164, 1164-1167 (1985).

V. THIS COURT SHOULD GRANT CERTIORARI AND REVERSE OR, AT A MINIMUM, REMAND FOR RECONSIDERATION IN LIGHT OF HARRIS V. FORKLIFT SYSTEMS BECAUSE THE NINTH CIRCUIT APPLIED AN IMPROPER STANDARD FOR ASSESSING HOSTILE WORKING ENVIRONMENTS.

Plaintiffs' prima facie case of disparate impact and the EEOC's English-only Guideline are based in part upon the fact that plant-wide English-only rules, such as that imposed by Spun Steak, which prohibit national origin minorities from speaking their primary language and suppress a core aspect of their ethnic identity, tend to create an "atmosphere of inferiority, isolation and intimidation based on national origin", thus fostering a discriminatory and hostile working environment. 29 C.F.R. § 1606.7(a).

The Ninth Circuit rejected this theory, holding that plaintiffs' evidence did not raise even a triable issue of material fact and that the EEOC could not presume English-only rules have such an effect. The court effectively held that English-only rules can never create a hostile working environment absent extraordinary circumstances -- i.e. where they "combine[] with other discriminatory behavior" and contribute to an overall environment of discrimination or are "enforced in such a draconian manner that the enforcement itself amounts to harassment." Spun Steak, 998 F.2d at 1489.

The Ninth Circuit's holding was predicated on its application of a legal standard erroneously discerned from the language of the Fifth Circuit's decision in Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972),

quoted in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986):

> [T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Spun Steak, 998 F.2d at 1488, quoting Rogers, supra, 454 F.2d at 238. But as this Court subsequently held in Harris v. Forklift Systems, ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), Meritor and Rogers "merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable." All that is required is conduct severe or pervasive enough to create "an environment that a reasonable person would find hostile or abusive." Harris, 114 S.Ct. at 371, 126 L.Ed.2d at 302 (emphasis added).

Under the proper "reasonable person" standard, the EEOC could rationally presume that English-only rules create an environment that a reasonable person would find hostile or abusive. Unlike cases involving sexual or racial harassment by an individual supervisor or co-worker where the range of possible unwelcome behavior necessarily admits of a wide spectrum of severity, the intimidating and oppressive impact of an institutionalized, company-wide English-only rule is pervasive and invariably disadvantages a protected class of employees.

In any event, plaintiffs' substantial evidence in the instant case, describing the intimidating manner in which the English-only rule was enforced and the oppressive effect of the rule upon their psychological and emotional well-being, certainly created a triable issue of fact as to whether the rule was severe or pervasive enough to create "an environment that a reasonable person would find hostile or abusive."

The Court should grant certiorari and reverse in light of this Court's intervening decision in Harris. See e.g. Helvering v.

Wiese, 292 U.S. 614 (1934). At a minimum, the Court should grant certiorari and remand the case to the Ninth Circuit for reconsideration in light of Harris. See e.g., Kirwan v. Romano, 425 U.S. 929 (1976); John Nuveen & Co. v. Sanders, 425 U.S. 928 (1976).

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari prayed for herein. At a minimum, Petitioners respectfully suggest that the Court invite the views of the United States, given the importance and effect of the Ninth Circuit's decision invalidating a long-standing Guideline of the EEOC.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-16733

D. C. No. CV-91-01949-RHS

PRISCILLA GARCIA; MARICELA BUITRAGO; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

Plaintiffs-Appellees,

v.

SPUN STEAK COMPANY, a California corporation,

Defendant-Appellant.

OPINION

Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, Senior Judge, Presiding

Argued and Submitted
November 3, 1992 — San Francisco, California

Filed July 16, 1993

Before: Robert Boochever, John T. Noonan, Jr., and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain; Dissent by Judge Boochever

COUNSEL

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Jennifer S. Goldstein, Equal Employment Opportunity Commission, Washington, D.C., for the amicus.

OPINION

O'SCANNLAIN, Circuit Judge:

We are called upon to decide whether an employer violates Title VII of the Civil Rights Act of 1964 in requiring its bilingual workers to speak only English while working on the job.

I

Spun Steak Company ("Spun Steak") is a California corporation that produces poultry and meat products in South San Francisco for wholesale distribution. Spun Steak employs thirty-three workers, twenty-four of whom are Spanish-speaking. Virtually all of the Spanish-speaking employees are Hispanic. While two employees speak no English, the others have varying degrees of proficiency in English. Spun Steak has never required job applicants to speak or to understand English as a condition of employment.

Approximately two-thirds of Spun Steak's employees are production line workers or otherwise involved in the production process. Appellees Garcia and Buitrago are production line workers; they stand before a conveyor belt, remove poultry or other meat products from the belt and place the product into cases or trays for resale. Their work is done individually. Both Garcia

and Buitrago are fully bilingual, speaking both English and Spanish.

Appellee Local 115, United Food and Commercial Workers International Union, AFL-CIO ("Local 115"), is the collective bargaining agent representing the employees at Spun Steak.

Prior to September 1990, these Spun Steak employees spoke Spanish freely to their co-workers during work hours. After receiving complaints that some workers were using their bilingual capabilities to harass and to insult other workers in a language they could not understand, Spun Steak began to investigate the possibility of requiring its employees to speak only English in the workplace. Specifically, Spun Steak received complaints that Garcia and Buitrago made derogatory, racist comments in Spanish about two co-workers, one of whom is African-American and the other Chinese-American.

The company's president, Kenneth Bertelson, concluded that an English-only rule would promote racial harmony in the workplace. In addition, he concluded that the English-only rule would enhance worker safety because some employees who did not understand Spanish claimed that the use of Spanish distracted them while they were operating machinery, and would enhance product quality because the U.S.D.A. inspector in the plant spoke only English and thus could not understand if a product-related concern was raised in Spanish. Accordingly, the following rule was adopted:

> [I]t is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your fluency in Spanish in a fashion which may lead other employees to suffer humiliation.

In addition to the English-only policy, Spun Steak adopted a rule forbidding offensive racial, sexual, or personal remarks of any kind.

It is unclear from the record whether Spun Steak strictly enforced the English-only rule. According to the plaintiffs-appellees, some workers continued to speak Spanish without incident. Spun Steak issued written exceptions to the policy allowing its clean-up crew to speak Spanish, allowing its foreman to speak Spanish, and authorizing certain workers to speak Spanish to the foreman at the foreman's discretion. One of the two employees who speak only Spanish is a member of the clean-up crew and thus is unaffected by the policy.

In November 1990, Garcia and Buitrago received warning letters for speaking Spanish during working hours. For approximately two months thereafter, they were not permitted to work next to each other. Local 115 protested the English-only policy and requested that it be rescinded but to no avail.

On May 6, 1991, Garcia, Buitrago, and Local 115 filed charges of discrimination against Spun Steak with the U.S. Equal Employment Opportunity Commission ("EEOC"). The EEOC conducted an investigation and determined that "there is reasonable cause to believe [Spun Steak] violated Title VII of the Civil Rights Acts of 1964, as amended, with respect to its adoption of an English-only rule and with respect to retaliation when [Garcia, Buitrago, and Local 115] complained."

Garcia, Buitrago, and Local 115, on behalf of all Spanish-speaking employees of Spun Steak, (collectively, "the Spanish-speaking employees") filed suit, alleging that the English-only policy violated Title VII. On September 6, 1991, the parties filed cross-motions for summary judgment. The district court denied Spun Steak's motion and granted the Spanish-speaking employees' motion for summary judgment, concluding that the English-only policy disparately impacted Hispanic workers without sufficient business justification and thus violated Title VII. Spun Steak filed this timely appeal and the EEOC filed a brief amicus curiae and participated in oral argument.

II

As a preliminary matter, we must consider whether Local 115 has standing to sue on behalf of the Spanish-speaking employees at Spun Steak. If Local 115 does not have standing, we will consider the application of the policy only to Garcia and Buitrago, both of whom speak English fluently.

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Here, it is clear that the Spanish-speaking employees would have standing to sue in their own right because they could claim injury from the application of the policy to them. Further, it is clear that the employees' interest in the conditions of the workplace is germane to Local 115's purpose as the collective bargaining agent of the employees. Finally, the claim asserted and the relief requested do not require the participation of individual members. Local 115 claims that the policy has a per se discriminatory impact on all Spanish-speaking employees. Further, the union is seeking only injunctive relief on behalf of its members, not damages.

In short, Local 115 has standing.

III

Sections 703(a)(1) and (2) of Title VII provide:

> (a) It shall be an unlawful employment practice for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). It is well-settled that Title VII is concerned not only with intentional discrimination, but also with employment practices and policies that lead to disparities in the treatment of classes of workers. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1970). Thus, a plaintiff alleging discrimination under Title VII may proceed under two theories of liability: disparate treatment or disparate impact. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1987). While the disparate treatment theory requires proof of discriminatory intent, intent is irrelevant to a disparate impact theory. *Id.* at 988. "[I]mpact analysis is designed to implement Congressional concern with 'the consequences of employment practices, not simply the motivation.'" *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (citations omitted).

A

The Spanish-speaking employees do not contend that Spun Steak intentionally discriminated against them in enacting the English-only policy. Rather, they contend that the policy had a discriminatory impact on them because it imposes a burdensome term or condition of employment exclusively upon Hispanic workers and denies them a privilege of employment that non-Spanish-speaking workers enjoy. Because their claim focuses on disparities in the terms, conditions, and privileges of employment, and not on barriers to hiring or promotion, it is outside the mainstream of disparate impact cases decided thus far. As a threshold matter, therefore, we must determine whether the disparate impact theory can be made applicable at all.

The disparate impact cause of action developed out of the language in section 703(a)(2) prohibiting discrimination based on deprivation of employment opportunities, such as the opportunity to be hired or promoted. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 448-50 (1981). Our court's disparate impact cases fall squarely within the language of Section 703(a)(2). The cases in which we have concluded that the plaintiff has proved discrimination based on a disparate impact theory have all involved plaintiffs who claimed that they were denied employment opportunities as the result of artificial, arbitrary, and unnecessary barriers that excluded members of a protected group from being hired or promoted, *see, e.g., Bouman v. Block*, 940 F.2d 1211, 1224-26 (9th Cir.), *cert. denied*, 112 S. Ct. 640 (1991), not plaintiffs contending that they were subjected to harsher working conditions than the general employee population.

[1] This case, by contrast, does not fall within the language of section 703(a)(2). While policies that serve as barriers to hiring or promotion clearly deprive applicants of employment opportunities, we cannot conclude that a burdensome term or condition of employment or the denial of a privilege would "limit, segregate, or classify" employees in a way that would "deprive any individual of employment opportunities" or "otherwise adversely affect his status as an employee" in violation of section 703(a)(2). *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977)

(deprivation of benefits does not fall under § 703(a)(2)). Such claims, therefore, must be brought directly under section 703(a)(1). We have never expressly considered, however, whether disparate impact theory applies to claims under section 703(a)(1), and the Supreme Court has explicitly reserved the issue. *Id.*

[2] Nevertheless, we are called upon to decide the issue in this case notwithstanding the parties' failure to brief it. Our decision is simple: we see no reason to restrict the application of the disparate impact theory to the denial of employment opportunities under section 703(a)(2). The Supreme Court has instructed that the language of section 703(a)(1) is to be interpreted broadly. "[T]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment," *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1985) (internal quotations and citations omitted), even when the differences in treatment are not the result of intentional discrimination. *See also Lynch v. Freeman*, 817 F.2d 380, 387 (6th Cir. 1987) ("The language of section 703(a)(2) is ... broad enough to include working conditions that have an adverse impact on a protected group of employees."). Regardless whether a company's decisions about whom to hire or to promote are infected with discrimination, policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and, if unsupported by a business justification, may be considered "discriminatory." *Id.*; *cf. Meritor Sav. Bank*, 477 U.S. at 57 (sexual harassment can be arbitrary barrier to equality in the marketplace). We are satisfied that a disparate impact claim may be based upon a challenge to a practice or policy that has a significant adverse impact on the "terms, conditions, or privileges" of the employment of a protected group under section 703(a)(1).

B

To make out a prima facie case of discriminatory impact, plaintiff must identify a specific, seemingly neutral practice or policy that has a significantly adverse impact on persons of a

protected class, *Teal*, 457 U.S. at 446. If the prima facie case is established, the burden shifts to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C.A. § 2000e-2(k)(1)(A) (Supp. 1992). In this case, the district court granted summary judgment in favor of the Spanish-speaking employees, concluding that, as a matter of law, the employees had made out the prima facie case and the justifications offered by the employer were inadequate.

[3] We first consider whether the Spanish-speaking employees have made out the prima facie case. "[T]he requirements of a prima facie disparate impact case ... are in some respects more exacting than those of a disparate treatment case." *Spaulding v. University of Washington*, 740 F.2d 686, 705 (9th Cir.) (citation omitted), *cert. denied*, 469 U.S. 1036 (1984). In the disparate treatment context, a plaintiff can make out a prima facie case merely by presenting evidence sufficient to give rise to an inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973). In a disparate impact case, by contrast, plaintiffs must do more than merely raise an inference of discrimination before the burden shifts; they "must actually prove the discriminatory impact at issue." *Rose*, 902 F.2d at 1421. In the typical disparate impact case, in which the plaintiff argues that a selection criterion excludes protected applicants from jobs or promotions, the plaintiff proves discriminatory impact by showing statistical disparities between the number of protected class members in the qualified applicant group and those in the relevant segment of the workforce. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1988). While such statistics are often difficult to compile, whether the protected group has been disadvantaged turns on quantifiable data. When the alleged disparate impact is on the conditions, terms, or privileges of employment, however, determining whether the protected group has been adversely affected may depend on subjective factors not easily quantified. The fact that the alleged effects are subjective, however, does not relieve the plaintiff of the burden of proving disparate impact. The plaintiff may not merely assert that the policy has harmed members of the group to which he or she belongs. Instead, the plaintiff must prove that the existence of

adverse effects of the policy, must prove that the impact of the policy is on terms, conditions, or privileges of employment of the protected class, must prove that the adverse effects are significant, and must prove that the employee population in general is not affected by the policy to the same degree.

It is beyond dispute that, in this case, if the English-only policy causes any adverse effects, those effects will be suffered disproportionately by those of Hispanic origin. The vast majority of those workers at Spun Steak who speak a language other than English -- and virtually all those employees for whom English is not a first language -- are Hispanic. It is of no consequence that not all Hispanic employees of Spun Steak speak Spanish; nor is it relevant that some non-Hispanic workers may speak Spanish. If the adverse effects are proved, it is enough under Title VII that Hispanics are disproportionately impacted.

[4] The crux of the dispute between Spun Steak and the Spanish-speaking employees, however, is not over whether Hispanic workers will disproportionately bear any adverse effects of the policy; rather, the dispute centers on whether the policy causes any adverse effects at all, and if it does, whether the effects are significant. The Spanish-speaking employees argue that the policy adversely affects them in the following ways: (1) it denies them the ability to express their cultural heritage on the job; (2) it denies them a privilege of employment that is enjoyed by monolingual speakers of English; and (3) it creates an atmosphere of inferiority, isolation, and intimidation. We discuss each of these contentions in turn.[1]

---

[1] The Spanish-speaking employees rely on the reasoning in *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989), which held that English-only policies adversely impact Spanish-speaking employees. The case has *no* precedential authority, however, because it was vacated as moot by the Supreme Court. We are in no way bound by its reasoning.

a

[5] The employees argue that denying them the ability to speak Spanish on the job denies them the right to cultural expression. It cannot be gainsaid that an individual's primary language can be an important link to his ethnic culture and identity. Title VII, however, does not protect the ability of workers to express their cultural heritage at the workplace. Title VII is concerned only with disparities in the treatment of workers; it does not confer substantive privileges. *See, e.g., Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). It is axiomatic that an employee must often sacrifice individual self-expression during working hours. Just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII which requires an employer to allow employees to express their cultural identity.

b

Next, the Spanish-speaking employees argue that the English-only policy has a disparate impact on them because it deprives them of a privilege given by the employer to native-English speakers: the ability to converse on the job in the language with which they feel most comfortable. It is undisputed that Spun Steak allows its employees to converse on the job. The ability to converse -- especially to make small talk -- is a privilege of employment, and may in fact be a significant privilege of employment in an assembly-line job. It is inaccurate, however, to describe the privilege as broadly as the Spanish-speaking employees urge us to do.

The employees have attempted to define the privilege as the ability to speak in the language of their choice. A privilege, however, is by definition given at the employer's discretion; an employer has the right to define its contours. Thus, an employer may allow employees to converse on the job, but only during certain times of the day or during the performance of certain tasks. The employer may proscribe certain topics as inappropriate during

working hours or may even forbid the use of certain words, such as profanity.

Here, as is its prerogative, the employer has defined the privilege narrowly. When the privilege is defined at is narrowest (as merely the ability to speak on the job), we cannot conclude that those employees fluent in both English and Spanish are adversely impacted by the policy. Because they are able to speak English, bilingual employees can engage in conversation on the job. It is axiomatic that "the language a person who is multi-lingual elects to speak at a particular time is ... a matter of choice." *Garcia*, 618 F.2d at 270. The bilingual employee can readily comply with the English-only rule and still enjoy the privilege of speaking on the job. "There is no disparate impact" with respect to a privilege of employment "if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference." *Id.*

This analysis is consistent with our decision in Jurado v. Eleven-Fifty Corporation, 813 F.2d 1406, 1412 (9th Cir. 1987). In *Jurado*, a bilingual disc jockey was fired for disobeying a rule forbidding him from using an occasional Spanish word or phrase on the air. We concluded that Jurado's disparate impact claim failed "because Jurado was fluently bilingual and could easily comply with the order" and thus could not have been adversely affected. *Id.*

[6] The Spanish-speaking employees argue that fully bilingual employees are hampered in the enjoyment of the privilege because for them, switching from one language to another is not fully volitional. Whether a bilingual speaker can control which language is used in a given circumstance is a factual issue that cannot be resolved at the summary judgment stage. However, we fail to see the relevance of the assertion, even assuming that it can be proved. Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class. Rather, Title VII protects against only those policies that have a ***significant*** impact. The fact that an employee may have to catch himself or herself from occasionally slipping into Spanish does not impose a burden

significant enough to amount to the denial of equal opportunity. This is not a case in which the employees have alleged that the company is enforcing the policy in such a way as to impose penalties for minor slips of the tongue. The fact that a bilingual employee may, on occasion, unconsciously substitute a Spanish word in the place of an English one does not override our conclusion that the bilingual employee can easily comply with the rule. In short, we conclude that a bilingual employee is not denied a privilege of employment by the English-only policy.

[7] By contrast, non-English speakers cannot enjoy the privilege of conversing on the job if conversation is limited to a language they cannot speak. As applied "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home," an English-only rule might well have an adverse impact. *Garcia*, 618 F.2d at 270. Indeed, counsel for Spun Steak conceded at oral argument that the policy would have an adverse impact on an employee unable to speak English. There is only one employee at Spun Steak affected by the policy who is unable to speak any English. Even with regard to her, however, summary judgment was improper because a genuine issue of material fact exists as to whether she has been adversely affected by the policy. She stated in her deposition that she was not bothered by the rule because she preferred not to make small talk on the job, but rather preferred to work in peace. Furthermore, there is some evidence suggesting that she is not required to comply with the policy when she chooses to speak. For example, she is allowed to speak Spanish to her supervisor. Remand is necessary to determine whether she has suffered adverse effects from the policy. It is unclear from the record whether there are any other employees who have such limited proficiency in English that they are effectively denied the privilege of speaking on the job. Whether an employee speaks such little English as to be effectively denied the privilege is a question of fact for which summary judgment is improper.

c

Finally, the Spanish-speaking employees argue that the policy creates an atmosphere of inferiority, isolation, and intimidation. Under this theory, the employees do not assert that the policy directly affects a term, condition, or privilege of employment. Instead, the argument must be that the policy causes the work environment to become infused with ethnic tensions. The tense environment, the argument goes, itself amounts to a condition of employment.

i

The Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. at 66, held that an abusive work environment may, in some circumstances, amount to a condition of employment giving rise to a violation of Title VII. The Court quoted with approval the decision in *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972):

> [T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Although *Vinson* is a sexual harassment case in which the individual incidents involved behavior that was arguably intentionally discriminatory, its rationale applies equally to cases in which seemingly neutral policies of a company infuse the atmosphere of the workplace with discrimination. The *Vinson* Court emphasized, however, that discriminatory practices must be pervasive before an employee has a Title VII claim under a hostile environment theory.

Here, the employees urge us to adopt a per se rule that English-only policies always infect the working environment to such a degree as to amount to a hostile or abusive work environment. This we cannot do. Whether a working environment is infused with discrimination is a factual question, one for which a per se rule is particularly inappropriate. The dynamics of an individual workplace are enormously complex; we cannot conclude, as a matter of law, that the introduction of an English-only policy, in every workplace, will always have the same effect.

[8] The Spanish-speaking employees in this case have presented no evidence other than conclusory statements that the policy has contributed to an atmosphere of "isolation, inferiority or intimidation." The bilingual employees are able to comply with the rule, and there is no evidence to show that the atmosphere at Spun Steak in general is infused with hostility toward Hispanic workers. Indeed, there is substantial evidence in the record demonstrating that the policy was enacted to prevent the employees from intentionally using their fluency in Spanish to isolate and to intimidate members of other ethnic groups. In light of the specific factual context of this case, we conclude that the bilingual employees have not raised a genuine issue of material fact that the effect is so pronounced as to amount to a hostile environment. *See generally Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2511 (1986).

ii

We do not foreclose the prospect that in some circumstances English-only rules can exacerbate existing tensions, or, when combined with other discriminatory behavior, contribute to an overall environment of discrimination. Likewise, we can envision a case in which such rules are enforced in such a draconian manner that the enforcement itself amounts to harassment. In evaluating such a claim, however, a court must look to the totality of the circumstances in the particular factual context in which the claim arises.

In holding that the enactment of an English-only while working policy does not inexorably lead to an abusive environment for those whose primary language is not English, we reach a conclusion opposite to the EEOC's long standing position. The EEOC Guidelines provide that an employee meets the prima facie case in a disparate impact cause of action merely by proving the existence of the English-only policy. *See* 29 C.F.R. § 1606.7 (a) & (b) (1991). Under the EEOC's scheme, an employer must always provide a business justification for such a rule. *Id.* The EEOC enacted this scheme in part because of its conclusion that English-only rules may "create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." 29 C.F.R. § 1606.7(a).

We do not reject the English-only rule Guideline lightly. We recognize that "as an administrative interpretation of the Act by the enforcing agency, these Guidelines ... constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank*, 477 U.S. 57 at 65 (internal quotations and citations omitted). But we are not bound by the Guidelines. *See Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94 (1973). We will not defer to "an administrative construction of a statute where there are 'compelling indications that it is wrong.'" *Id.*

[9] We have been impressed by Judge Rubin's pre-Guidelines analysis for the Fifth Circuit in *Garcia*, which we follow today. *Garcia*, 618 F.2d 264. Nothing in the plain language of section 703(a)(1) supports EEOC's English-only rule Guideline. "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business." *United Steelworkers of America, AFL-CIO v. Weber*, 443 U.S. 193

(1979). "Those legislators demanded as a price for their support that," *id.*,

> management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.

Statement of William M. McCulloch, et al., H.R. Rep. No. 914, 88 Cong., 2d Sess (1964), *reprinted in* 1964 U.S.C.C.A.N. 2516 (quoted in part in *Steelworkers*, 443 U.S. at 206). It is clear that Congress intended a balance to be struck in preventing discrimination and preserving the independence of the employer. In striking that balance, the Supreme Court has held that a plaintiff in a disparate impact case must prove the alleged discriminatory effect before the burden shifts to the employer. The EEOC Guideline at issue here contravenes that policy by presuming that an English-only policy has a disparate impact in the absence of proof. We are not aware of, nor has counsel shown us, anything in the legislative history to Title VII that indicates that English-only policies are to be presumed discriminatory. Indeed, nowhere in the legislative history is there a discussion of English-only policies at all.

2

Because the bilingual employees have failed to make out a prima facie case, we need not consider the business justifications offered for the policy as applied to them. On remand, if Local 115 is able to make out a prima facie case with regard to employees with limited proficiency in English, the district court could then consider any business justification offered by Spun Steak.

IV

In sum, we conclude that the bilingual employees have not made out a prima facie case and that Spun Steak has not violated Title VII in adopting an English-only rule as to them. Thus, we reverse the grant of summary judgment in favor of Garcia, Buitrago, and Local 115 to the extent it represents the bilingual employees, and remand with instructions to grant summary judgment in favor of Spun Steak on their claims. A genuine issue of material fact exists as to whether there are one or more employees represented by Local 115 with limited proficiency in English who were adversely impacted by the policy. As to such employee or employees, we reverse the grant of summary judgment in favor of Local 115, and remand for further proceedings.

REVERSED and REMANDED.

Boochever, Circuit Judge, dissenting in part:

I agree with most of the majority's carefully crafted opinion. I dissent, however, from the majority's rejection of the EEOC guidelines. The guidelines provide that an employee establishes a prima facie case in a disparate impact claim by proving the existence of an English-only policy, thereby shifting the burden to the employer to show a business necessity for the rule. *See* 29 C.F.R. § 1606.7(b) (1991) ("An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity."). I would defer to the Commission's expertise in construing the Act, by virtue of which it concluded that English-only rules may "create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." *Id.* § 1606.7(a).

As the majority indicates, proof of such an effect of English-only rules requires analysis of subjective factors. It is hard to envision how the burden of proving such an effect would be met other than by conclusory self-serving statements of the

Spanish-speaking employees or possibly by expert testimony of psychologists. The difficulty of meeting such a burden may well have been one of the reasons for the promulgation of the guideline. On the other hand, it should not be difficult for an employer to give specific reasons for the policy, -- such as the safety reasons advanced in this case.

It is true that EEOC regulations are entitled to somewhat less weight than those promulgated by an agency with Congressionally delegated rulemaking authority. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976). Nevertheless, the EEOC guideline is entitled to "great deference" in the absence of "compelling indications that it is wrong." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973). While one may reasonably differ with the EEOC's position as a matter of policy, I can find no such "compelling indications" in this case. The lack of directly supporting language in § 703(a)(1) or the legislative history of Title VII, relied on by the majority, does not in my opinion make the guideline "inconsistent with an obvious congressional intent not to reach the employment practice in question." *Id.* at 94.

I conclude that if appropriate deference is given to the administrative interpretation of the Act, we should follow the guideline and uphold the district court's decision that a prima facie case was established. I believe, however, that triable issues were presented whether Spun Steak established a business justification for the rule, and I would remand for trial of that issue.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-16733
D. C. No. CV-91-01949-RHS

PRISCILLA GARCIA; MARICELA BUITRAGO; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

Plaintiffs-Appellees,

v.

SPUN STEAK COMPANY, a California corporation,

Defendant-Appellant.

ORDERS AND DISSENT

Filed October 29, 1993

Before: Robert Boochever, John T. Noonan, Jr., and Diarmuid F. O'Scannlain, Circuit Judges.

ORDER

The order filed October 29, 1993, with dissent, is ordered published.

ORDER

The panel [slip op. 14479], with Judge Boochever dissenting, has voted to deny appellees' petition for rehearing. Judges Noonan and O'Scannlain have voted to reject the suggestion for rehearing en banc and Judge Boochever has recommended acceptance of the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to [14480] rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Reinhardt, Circuit Judge, dissenting from denial of rehearing en banc:

Once again, a civil rights principle is the loser at the hands of an unsympathetic court.[1/] In this case, by a divided vote, a three-judge panel invalidated an Equal Employment Opportunity Commission (EEOC) Guideline of national scope, upheld an employment rule that discriminates against national-origin minorities without requiring any showing of business justification, and challenged the EEOC's ability to enact rules codifying its findings regarding specific discriminatory practices. See Garcia v. Spun Steak Co., No. 91-16733 (July 16, 1993). The two judges in the majority were able to do so only by improperly substituting their policy judgments for those of the EEOC and by misconstruing, or, in one instance, completely disregarding, prior case law.

1/ In one recent period, five major decisions hostile to civil rights were handed down by the Supreme Court only to be overturned by Congress in the Civil Rights Restoration Act of 1991. See Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

This circuit, with its enormous immigrant population, a large proportion of whom arrived here only recently, is now the only circuit in the nation in which an employer may adopt a discriminatory English-only rule without even articulating a business justification to support it. Unfortunately, the growth **[14481]** of the immigrant population and the present mood of anti-immigrant backlash mean that English-only rules are likely to become more prevalent. In overriding the EEOC's determination that such rules are generally discriminatory, the Spun Steak panel subverted one of the basic goals of Title VII of the Civil Rights Act of 1964, the elimination of discrimination on the basis of national origin. Accordingly, I dissent from the court's refusal to rehear Spun Steak en banc.

I. Background.

Plaintiffs Priscilla Garcia and Maricela Buitrago are production line workers at Spun Steak Company ("Spun Steak"), a California corporation that produces poultry and meat products for wholesale distribution. Plaintiff Local 115, United Food and Commercial Workers International Union ("Local 115"), is the collective bargaining agent representing Spun Steak employees.

Of the thirty-three workers employed at Spun Steak, twenty-four are Spanish-speaking. Virtually all of Spun Steak's Spanish-speaking employees are Hispanic. Their command of English varies greatly: two employees speak no English, others have limited English proficiency, while some such as Garcia and Buitrago speak English fluently.

In September 1990, an English-only rule was instituted at Spun Steak. The rule prohibited employees from speaking Spanish on the job except during lunch and other breaks. Both Garcia and Buitrago were subsequently reprimanded for violating the English-only rule. Local 115 protested the rule and unsuccessfully requested that it be rescinded.

After investigating discrimination charges filed by Garcia, Buitrago, and Local 115, the Equal Employment Opportunity Commission found that there was reasonable cause to believe that Spun Steak violated Title VII of the Civil Rights Act of 1964 in adopting its English-only rule. In accordance with the **[14482]** EEOC finding, Garcia, Buitrago, and Local 115, on behalf of all

Spanish-speaking employees of Spun Steak (collectively, the "Spanish-speaking employees"), filed suit in federal district court alleging a violation of Title VII and requesting injunctive relief. The Spanish-speaking employees, in accordance with the EEOC Guideline pertaining to English-only rules, made out a prima facie case of national-origin discrimination by demonstrating that Spun Steak had instituted an English-only rule, while Spun Steak attempted to rebut their showing by demonstrating a business justification for the rule. The opposing sides filed cross-motions for summary judgment, and the district court ruled in favor of the employees. The court found that Spun Steak's English-only policy had a disparate impact on Hispanic workers without sufficient business justification, in violation of Title VII.

Spun Steak appealed the ruling to this court. The EEOC, as the federal agency charged with the interpretation and enforcement of Title VII, filed an amicus curiae brief arguing that Spun Steak's English-only policy violated Title VII, and urging that the district court judgment be affirmed. The arguments of plaintiffs and the EEOC were rejected, however, by a majority of the Spun Steak panel. The majority did not reach the question of whether there was a business justification for the rule. Rather, over the dissent of Judge Boochever, it invalidated the applicable EEOC Guideline and held that English-only rules are permissible with respect to bilingual employees.

II. The Adverse Impact of English-Only Rules.

Title VII prohibits discrimination in employment based on race, color, sex, religion and national origin, 42 U.S.C. § 2000e-2. The close relationship between language and national origin led the EEOC to classify discrimination based on "linguistic characteristics" as unlawful under Title VII (29 C.F.R. § 1606.1), a classification which the Spun Steak panel does not challenge. See Fragrante v. City and County of [14483] Honolulu, 888 F.2d 591, 595 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990) (approving § 1606.1).

The EEOC Guideline at issue in Spun Steak applies Title VII to English-only rules. 29 C.F.R. § 1606.7 (1991). It permits the use of such rules only where a business justification exists. The Guideline reflects the EEOC's determination that rules

prohibiting the use of foreign languages generally have an adverse impact on protected groups. As the Guideline explains, "[t]he primary language of an individual is often an essential national origin characteristic," so that an English-only rule may "create an atmosphere of inferiority, isolation and intimidation." 29 C.F.R. § 1606.7(a).

The Spun Steak majority disagrees with the EEOC's determination. My colleagues have in their wisdom concluded that bilingual employees do not suffer significant adverse effects from an English-only rule because they have the "choice" of which language to employ, and can thus "readily comply" with the rule. Slip op. at 7538. This analysis demonstrates a remarkable insensitivity to the facts and history of discrimination. Whether or not the employees can readily comply with a discriminatory rule is by no means the measure of whether they suffer significant adverse consequences. Some of the most objectionable discriminatory rules are the least obtrusive in terms of one's ability to comply: being required to sit in the back of a bus, for example; or being relegated during one's law school career to a portion of the classroom dedicated to one's exclusive use. See McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851 (1950). Nonetheless, the majority focusses narrowly upon the ability to comply, substituting its own unenlightened conception of discriminatory impact for that adopted by the EEOC on the basis of its store of knowledge, wisdom and experience in the field of employment discrimination.

Language is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as [14484] an "inconvenience" to the affected employees, as Spun Steak asserts. See generally Piatt, Toward Domestic Recognition of a Human Right to Language, 23 Hous. L. Rev. 885, 894-98 (1986) (discussing relationship between language and culture); Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. Rev. 303, 351-57 (1986). Even when an individual learns English and becomes assimilated into American society, his native language remains an important manifestation of his ethnic identity and a means of affirming links to his original culture. See Karst, supra, at 351-57. English-only rules not only symbolize a

rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality.[2/]

Thus, the Spun Steak majority's emphasis on the practical effects of English-only rules is misplaced. Whether or not an individual is, in practice, capable of speaking only English is not the important consideration here by any means. What is far more important is the impact of the prohibition itself. As the EEOC correctly determined, being forbidden under penalty of discharge to speak one's native tongue generally has a pernicious effect on national origin minorities.

Finally, it should be noted that the imposition of an English-only rule may mask intentional discrimination on the basis of national origin. See Gutierrez, 838 at 1040 (citing authorities). Even those who support the majority's view acknowledge that "language can be a potent source of racial and ethnic discrimination." Gutierrez v. Municipal Court, 861 F.2d 1187, 1192 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing en banc). History is replete with language conflicts that attest, not only to the crucial importance [14485] of language to its speakers, but also to the widespread tactic of using language as a surrogate for attacks on ethnic identity.[3/] As these examples

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2/ As one commentator observed: "Language is the lifeblood of every ethnic group. To economically and psychologically penalize a person for practicing his native tongue is to strike at the core of ethnicity." Comment, Native-Born Acadians and the Equality Ideal, 46 La. L. Rev. 1151, 1167 (1986).

3/ The harsh repression of Catalan and the Basque language in Spain under the dictatorship of Francisco Franco is one obvious example. See Basques Are Waging A Difficult Battle to Preserve Language, Dallas Morning News, Apr. 3, 1993, at 25A (Franco dictatorship "banned public use of Basque and other regional languages"). Other more current examples include the repression of the Ukrainian, Georgian and Belorussian languages by the former Soviet government; the current repression of the Albanian language in Kosovo (formerly part of Yugoslavia); and the extended repression of the Kurdish language in Turkey. See, e.g., Shiller, Albanian Students Defy Serb Rule, Toronto Star, Nov. 2, 1992, at A14; Robinson, Restless Ukraine Strains at the Bonds of Soviet Empire, Fin. Times, Sept. 4, 1990, at 6 (citing "Moscow's systematic repression of the

(continued...)

reveal, the urge to repress another's language is rarely, if ever, driven by benevolent impulses.

Recognizing the discriminatory potential inherent in rules prohibiting the use of foreign languages, the EEOC has attempted to provide victims with legal rights. Spun Steak's misguided removal of that protection, based largely on two judges' subjective judgment that the discriminatory impact of English-only rules is "not significant," seriously undermines one of the basic goals of Title VII.

III. "Compelling" Reasons for Invalidating the EEOC Guideline.

The EEOC Guideline at issue in Spun Steak provides that an employee makes out a prima facie case of national origin discrimination by proving that the employer has adopted an English-only rule. See 29 C.F.R. § 1606.7(b) (1991). The resulting presumption of discrimination is rebuttable, however. An English-only rule will be upheld if the employer shows that it is supported by a business justification. Id. Thus, instead of imposing a more onerous per se rule, the Guideline **[14486]** creates a framework of shifting burdens. Given the history of national origin discrimination in this country, the rule is surely a moderate and reasonable one.

In invalidating the EEOC Guideline, the Spun Steak majority virtually ignores the long-standing rule that EEOC Guidelines "constitute 'the administrative interpretation of [Title VII] by the enforcing agency,' and [that] consequently they are 'entitled to great deference.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975), quoting Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971). See also Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973) (EEOC Guideline entitled to deference unless "there are 'compelling indications that it is wrong'"); EEOC v. Commercial Office Products Co., 486 U.S. 107, 115 (1988) ("EEOC's interpretation of ambiguous language

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3/(...continued)

Ukrainian language"); Turkish-Kurdish Agonies, Wash. Post, July 3, 1993, at A22 (discussing cultural repression of Kurds and the denial of Kurdish language rights).

need only be reasonable to be entitled to deference"). Though acknowledging that only "compelling indications" that the Guideline was erroneous would justify rejecting it, the majority makes only a token effort to abide by this standard, dedicating less than a page to describing its "compelling" reasons for invalidating the Guideline.[4/]

In its short discussion of the topic, the Spun Steak majority lists four justifications for rejecting the Guideline, none of which is persuasive, let alone compelling. Slip op. at 7542-43. First, the majority claims to follow Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981) [hereinafter "Gloor"], in which the Fifth Circuit did not even consider the EEOC Guideline (since none existed at the time), but only described how a court would rule in the absence of agency construction of Title VII.[5/] Second, unable to find spe- [14487] cific evidence that the Guideline was erroneous, the majority contents itself with quoting general observations indicating Congress' disinclination to infringe on the independence of employers and unions except to correct discriminatory practices. Slip op. at 7542-43 (quoting United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 206 (1979)). Here, the majority ignores the obvious fact that correcting a discriminatory practice is precisely what the EEOC was trying do. In any event, if such self-evident and general statements are sufficient to override the deference due EEOC Guidelines, then every Guideline is in grave jeopardy.

Third, and most incomprehensible, the majority objects to the presumption of disparate impact contained in the EEOC Guideline. It does so not on the merits of the presumption, but on

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4/ Spun Steak's dismissive treatment of the EEOC rule is unprecedented within the Ninth Circuit. This Court has always cited the Guidelines with approval. See Fragante v. City and County of Honolulu, 888 F. 2d 591, 595 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990); Jurado v. Eleven-Fifty Corp., 813 F. 2d 1406, 1411 (9th Cir. 1987).

5/ In fact, the Guideline at issue here was enacted shortly after Gloor, probably in order to reverse the effect of that decision. The majority simply ignores this history.

the basis of the uncontroversial and irrelevant proposition that in disparate impact cases plaintiffs have the burden of proving the discriminatory effect of the challenged policies. The panel's "reasoning" constitutes a total non-sequitur.[6/] There is simply no connection between the elementary proposition stated by the majority -- that plaintiffs have the burden of proof -- and the majority's deduction therefrom that the EEOC is barred from (1) making generalized findings regarding the effects of particular discriminatory policies, and (2) codifying those findings in a rule that such policies are unlawful unless justification exists in particular cases. In effect, the majority holds that the agency is without authority to determine that English-only rules and similar discriminatory practices are invalid generally.[7/] The majority apparently believes [14488] that the question of the validity of a widespread discriminatory practice must be decided over and over again on a case by case basis in a private lawsuit each time a new employer adopts it. The majority's remarkably narrow view of the EEOC's authority is reminiscent of courts of the 1930s which

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6/ The majority states that "the Supreme Court has held that a plaintiff must prove the alleged discriminatory effect before the burden shifts to the employer. The EEOC Guideline at issue here contravenes that policy by presuming that an English-only policy has a disparate impact in the absence of proof." Slip op. at 7543.

7/ Under the majority's unique approach, an EEOC Guideline stating, for example, that rules requiring employees to be at least six feet tall are presumed to have a disparate impact on women would be held invalid even though the Supreme Court had held that height and weight requirements have a disparate impact on women and the factual or statistical issue is the same in all cases. See Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977) (finding that Alabama prison system's height and weight requirements disparately impact women solely on the basis of statistical evidence).

It is clear that the real basis of the majority's objection to the EEOC presumption is that the majority does not agree with the Guideline on the merits. This substantive disagreement is at least rational (though the majority's view is wrong), but it should not be transformed into a wholly baseless attack on agency authority to promulgate general rules.

refused to accept agency findings regarding labor and food standards.[8/] It is a particularly odd view for the 1990s given the broad authority that courts have allowed agencies to exercise in recent years.

Finally, the Spun Steak majority cites as a reason for its decision the absence of legislative history regarding Title VII's applicability to English-only rules. Slip op. at 7543. With this argument, the majority elevates legislative history to a new height. Those who believe that even affirmative legislative history is, in general, not compelling may be surprised to learn that its absence can be so crucial as to constitute a basis for invalidating an agency rule. See, e.g., United States v. Thompson/Center Arms Co., 112 S.Ct. 2102, 2111 (1992) (Scalia, J., concurring in judgment) (describing legislative history as "that last hope of lost interpretative causes, that St. Jude of the hagiology of statutory construction"). **[14489]**

IV. Related Cases.

The Spun Steak majority contends that its analysis is "consistent" with Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987), and that it "follows" Gloor. Slip op. at 7538, 7542. In contrast, the majority dismisses Gutierrez v. Municipal Court, 832 F.2d 1031 (9th Cir. 1988), reh'g en banc denied, 861 F.2d 1187 (1988), vacated as moot, 490 U.S. 1016 (1989), in a footnote, without pretending to counter, or even examine, the case's reasoning. Slip op. at 7536 n. 1. In none of the three instances does the majority deal fairly with the case cited. Gutierrez, as a unanimous Ninth Circuit decision on precisely the same issue as faced the Spun Steak panel, merited examination for its reasoning and persuasive value. Jurado and Gloor, while not spurned as is Gutierrez, are misused through selective reference.

Five years ago, this court in Gutierrez unanimously upheld the EEOC Guideline at issue in Spun Steak, holding that English-

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8/ Any concern for an employer's right to a fair hearing and individualized consideration is satisfied by the business justification provision of the EEOC rule, which allows the employer to articulate the specific reasons supporting an English-only policy. See Slip op. at 7544-45 (Boochever, J., dissenting in part).

only employment rules generally have an adverse impact on national origin groups. See 861 F.2d at 1040. The plaintiff in Gutierrez, however, quit her job before her employer's appeal reached the Supreme Court. As a result, the Court vacated our decision as moot. Gutierrez, 490 U.S. 1016 (1989). Unconstrained by precedential considerations, the Spun Steak majority wrongly declined even to consider Gutierrez' reasoning. While it is true that Gutierrez lacks binding precedential value, it still represented the thinking of this court. As such, it was deserving of consideration. Gutierrez not only constituted a decision of a three-judge panel, but it had survived an en banc call. See Gutierrez, 861 F.2d 1188 (Kozinski, J., dissenting from denial of rehearing en banc) (joined by Judge Thompson and Judge O'Scannlain). Gutierrez was binding precedent within this circuit and might well have remained so, but for the happenstance of an employee's job decision.[9/] As far as our court is concerned, [14490] Gutierrez represented its official position, following completion of all our review proceedings. As such, it merited more than a dismissive footnote in Spun Steak.

As the Spun Steak majority should have known, the validity of a case's reasoning is unaffected when it is vacated as moot. See Wright, 13A Federal Practice & Procedure § 3533.10 (1984). The Spun Steak majority cites no new caselaw to justify its different result, making it clear that the only significant change since Gutierrez is that of panel composition: a Gutierrez en banc dissenter, assigned to Spun Steak and having by luck of the draw picked up a second vote, was thereby transformed into the author of a two-judge majority opinion. Moreover, Gutierrez has proved persuasive to other courts: it was cited with approval in Smothers v. Benitez, 806 F. Supp. 299, 307-08 (D.P.R. 1992), Pemberthy v. Beyer, 800 F. Supp. 144, 159 (D.N.J. 1992), and Asian Am. Business Group v. City of Pomona, 716 F. Supp. 1328, 1330 (C.D. Cal. 1989). These three cases involved issues related to the question decided in Gutierrez; Spun Steak, ruling on the identical issue as Gutierrez, should at least have accorded it fair consideration.

9/ Of course, the Supreme Court might have granted certiorari and affirmed or reversed -- we will never know.

Spun Steak's use of the Fifth Circuit's Gloor decision is equally unacceptable. In discussing its reasons for invalidating the EEOC Guideline, the majority professes to be guided by Gloor. That decision, however, pre-dated the Guideline at issue. It is disingenuous for the Spun Steak majority to profess to follow a case which did not and could not have ruled on the validity of the affected Guideline. The Gloor court, in fact, specifically noted the absence of any controlling EEOC Guideline in justifying its ruling. Gloor, 618 F.2d at 268 n. 1.[10/] [14491] Rather than following Gloor, it should be clear that Spun Steak's rejection of the EEOC Guideline represents a radical recasting of Gloor in disregard of Gloor's own express self-imposed limitations and of the deference due EEOC Guidelines.

Finally, there is Spun Steak's reliance on Jurado. Before discussing Jurado in detail, though, one should first note something that the Spun Steak majority fails to mention: the Jurado court cites with approval the exact EEOC Guideline which Spun Steak rejects. See Jurado, 813 F.2d at 1411. An examination of Jurado's facts shows why this is so.

Jurado involved a bilingual radio announcer, Valentine Jurado, whose show was in English, with Spanish words and phrases occasionally added. A consultant hired by the station determined that this sprinkling of Spanish hurt the station's ratings because it confused listeners about the station's programming. Accordingly, the station program director asked Jurado to stop using Spanish in his broadcasts. Jurado refused, the radio station fired him, and he brought suit under Title VII.

No reasonable person would suggest that Title VII requires the operator of an English language radio station to permit a hired broadcaster to broadcast in whole or in part in another language, contrary to the radio station's policies. As the Jurado court recognized, the radio station's limited English-only rule "was a

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10/ The Fifth Circuit took care to point out that:

> [The EEOC) has adopted neither a regulation stating a standard for testing such language rules nor any general policy, presumed to be derived from the statute, prohibiting them. We therefore approach the problem on the basis of the statute itself and the case law.

Gloor, 618 F.2d at 268 n. 1.

programming decision motivated by marketing, ratings, and demographic concerns." 813 F.2d at 1410. As such, it easily passed the business justification requirement. See Gutierrez, 838 F.2d at 1041. There is no analogy or comparison that can legitimately be drawn between the situation in Jurado and that in Spun Steak. For example, Spun Steak has never required its employees to speak or even understand English as a condition of employment, and it makes no claim that the ability to speak or understand English is a bona fide occupational qualification (BFOQ). In Jurado, [14492] by contrast, the employer would without question have refused to employ a non-English-speaker, or even a person who spoke English with a marked foreign accent; such a job refusals would not have constituted national origin discrimination but simply the implementation of an appropriate job qualification. Cf. Fragrante v. City of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989) ("[a]n adverse employment decision may be predicated upon an individual's accent when--but only when--it interferes materially with job performance").[11/]

Spun Steak fails to discuss these aspects of Jurado, even though Jurado is clearly the principal Ninth Circuit precedent on English-only rules. By not mentioning that Jurado specifically applies to the adoption of a "business-related English-only rule," 813 F.2d at 1411, or that it relies on the EEOC Guideline, the Spun Steak majority renders Jurado unrecognizable.

11/ Similarly, a commentator who supports the reasoning in both Gutierrez and Jurado explains that the right to speak one's native language is:

> bounded by the actual requirements of the job and business at issue. In certain situations, it is clearly inappropriate for someone to speak a language other than English in the workplace. . . . [A] bilingual stage actor cast in the role of Hamlet would not have a right to deliver the soliloquy in Spanish. . . . [The actor's use of Spanish] would constitute poor performance, and the employer could properly discipline or discharge a poorly performing employee.

Perea, English-Only Rules and the Right To Speak One's Primary Language in the Workplace, 23 J. L. Ref. 265, 299 (1990).

Conclusion.

By failing to take this case en banc, this court disrupts the uniform national application of an important EEOC Guideline, drastically handicaps the agency's ability to adopt other Guidelines, distorts or ignores Ninth Circuit caselaw in a highly sensitive area, and allows two of its judges to substi- **[14493]** tute their policy views regarding the subject of national-origin discrimination for the EEOC's experienced, reasoned and expert judgment. As a result, we rack up one more judicial defeat for those who most need and deserve the protection of the courts. I therefore respectfully dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-91-1949 RHS

PRISCILLA M. GARCIA, MARICELA BUITRAGO, and LOCAL 115, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

Plaintiffs,

v.

SPUN STEAK COMPANY,
a California corporation,

Defendant.

Edward M. Chen, Ann Brick, Matthew A. Coles, Alan L. Schlosser, American Civil Liberties Union Foundation of Northern California, Inc., Christopher Ho, The Employment Law Center, a Project of the Legal Aid Society of San Francisco, William H. Orrick, III, Ruben L. Iniguez, Coblentz, Cahen, McCabe & Breyer, Thornton C. Bunch, Jr., Bunch & Grimes, for plaintiffs.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE FIRST AND THIRD CLAIMS FOR RELIEF OF THEIR COMPLAINT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The motion of plaintiffs Priscilla M. Garcia, Maricela Buitrago, and Local 115, United Food and Commercial Workers International Union, AFL-CIO, for summary judgment on the first and third claims for relief of their complaint and the cross-motion of defendant Spun Steak Company for summary judgment came on regularly for hearing in the above-entitled court on Friday, October 4, 1991, the Honorable Robert H. Schnacke, presiding. William H. Orrick, III of Coblentz, Cahen, McCabe & Breyer and Thornton C. Bunch, Jr. of Bunch & Grimes appeared on behalf of plaintiffs; Douglas J. Farmer of the United States Equal Employment Opportunity Commission appeared as Amicus Curiae; and James A. Carter of Hendrickson, Higbie & Carter appeared on behalf of defendant. Following argument of counsel and consideration of the parties' moving and responding papers, the Court finds as follows:

1. There are no genuine issues as to any material fact with respect to the first and third claims for relief in plaintiffs' complaint nor defendant's Counterclaim For Declaratory Relief;

2. State law issues substantially predominate in each and every other claim for relief in plaintiffs' complaint; and

3. Plaintiffs' motion to strike defendant's evidence is denied.

For good cause appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiffs' motion for summary judgment on the first and third claims for relief of their complaint is granted on the basis that there is no genuine issue as to any material fact and plaintiffs are entitled to a judgment as a matter of law. For the same reason, plaintiffs are entitled to judgment in their favor on defendant's Counterclaim For Declaratory Relief.

2. Defendant's motion for summary judgment is denied in its entirety.

3. The Court will not exercise supplemental jurisdiction over plaintiffs' second, fourth, fifth, sixth, seventh, eighth, and ninth claims for relief, and all of said claims are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c) (2).

DATED: October 10, 1991.

/s/ Robert H. Schnacke
United States District Judge

APPROVED AS TO FORM:

HENDRICKSON, HIGBIE & CARTER

By /s/ Karen T. Dutton
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-91-1949 RHS

PRISCILLA M. GARCIA, MARICELA BUITRAGO, and LOCAL 115, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

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JUDGMENT

Pursuant to the Order Granting Plaintiffs' Motion For Summary Judgment On The First And Third Claims For Relief Of Their Complaint And Denying Defendant's Motion For Summary Judgment, the Court found that the English-only policy established by defendant Spun Steak Company in writing on September 28, 1990, and amended in writing on June 25, 1991, constitutes unlawful discrimination in the terms and conditions of employment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the California Fair Employment and Housing Act, California Government Code section 12900 et seq.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Judgment is hereby entered in favor of plaintiffs Priscilla M. Garcia, Maricela Buitrago, and Local 115, United Food and Commercial Workers, International Union, AFL-CIO, and against defendant Spun Steak Company, a California corporation, on the first and third claims for relief of plaintiffs' complaint, and on defendant's Counterclaim For Declaratory Relief. The Court grants plaintiffs' request for declaratory relief that defendant's English-only policy constitutes unlawful discrimination in the terms and conditions of employment in violation of Title VII of the Civil Rights Act of 1964 and the California Fair Employment and Housing Act.

2. Defendant Spun Steak Company is permanently enjoined from further maintaining, enforcing or reestablishing its English-only policy or any policy which requires that defendant's employees speak only English in the performance of their work duties.

DATED: October 10, 1991.

/s/ Robert H. Schnacke
United States District Judge

APPROVED AS TO FORM:

HENDRICKSON, HIGBIE & CARTER

By /s/ Karen T. Dutton
Attorneys for Defendant
Spun Steak Company

APPENDIX D

42 U.S.C. § 2000e-2. Unlawful employment practices.

Employer Practices:

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

—o—

29 C.F.R. Ch. XIV - Equal Employment Opportunity Commission
PART 1606–GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

§ 1606.1 Definition of national origin discrimination.

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for

reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general title VII principles, such as disparate treatment and adverse impact.

§ 1606.2 Scope of Title VII protection.

Title VII of the Civil Rights Act of 1964, as amended, protects individuals against employment discrimination on the basis of race, color, religion, sex or national origin. The title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination. These Guidelines apply to all entities covered by title VII (collectively referred to as "employer").

(....)

§ 1606.7 Speak-English-only rules.

(a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory

working environment.[1] Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

(b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) *Notice of the rule.* It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

(....)

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[1] See CD 71-446 (1970), CCH EEOC Decisions ¶ 6173, 2 FEP Cases, 1127; CD 72-0281 (1971), CCH EEOC Decisions ¶ 6293.

APPENDIX E

UNITED STATES OF AMERICA

CONGRESSIONAL RECORD

PROCEEDINGS AND DEBATES OF THE 102d CONGRESS,
FIRST SESSION
WASHINGTON, WEDNESDAY, OCTOBER 30, 1991
Vol. 137, No. 158

SENATE
(Legislative day of Tuesday, October 29, 1991)

The Senate met at 11:30 a.m., on the expiration of the recess, and was called to order by BOB GRAHAM, a Senator from the State of Florida.

(....)

SCHEDULE

Mr. MITCHELL. Mr. President, today during the period for morning business, two Senators are to be recognized to address the Senate for 10 minutes each. When the period for morning business closes at 12 noon today, the Senate will resume consideration of S. 1745, the civil rights bill, at which time the bill will be considered under the terms of a unanimous-consent agreement entered late last night and printed on page 2 of today's Calendar of Business.

(....)

Mr. DeCONCINI. I commend Senator KENNEDY for his leadership in the area of civil rights and would like to know if it is also his understanding that the Supreme Court's holding in Saint Francis College versus Al-Khazraji is a correct interpretation of section 1981?

Mr. KENNEDY. Yes, I believe the decision is a correct interpretation of section 1981.

Mr. DeCONCINI. Is there anything in the substitute to S. 1745 that would affect in any way the Court's holding in this case?

Mr. KENNEDY. No, the bill does not in any way repeal the St. Francis College decision. The discrimination described by the court in Saint Francis College is, in effect, national origin discrimination, which is the term used in title VII of the Civil Rights Act to identify this particular type of discrimination.

Mr. DeCONCINI. Is it the Senator's understanding that "national origin described by the court in St. Francis upon characteristics common to a specific ethnic group, such as ancestry, culture, linguistic characteristics--including language and speech accent--physical characteristics, and birthplace?

Mr. KENNEDY. Yes, that is my understanding.

Mr. DeCONCINI. Consistent with this interpretation, would the Senator agree that Congress intended that, to state a cause of action under section 1981, it is sufficient to allege discrimination based solely upon national origin.

Mr. KENNEDY. Yes. I agree.

Mr. DeCONCINI. I thank the Senator. I also have another matter that I would like to discuss. This is the issue of workplace rules which require the speaking of only one language. Many of my constituents have brought to my attention an increasing problem with nonjob related discipline and termination of people for speaking languages other than English in the workplace. Is the Senator aware of the EEOC regulations dealing with this problem?

Mr. KENNEDY. Yes, the EEOC promulgated such regulations in 1980.

Mr. DeCONCINI. These regulations reflect the fact that the primary language of an individual is often an essential national origin characteristic. Does the Senator agree that these regulations found in 29 CFR 16067.7 provide a sound and effective method for dealing with this problem?

Mr. KENNEDY. Yes, I agree that this regulation has worked well during the past 11 years it has been in effect.

Mr. DeCONCINI. Does the substitute to S. 1745 in any way adversely affect the EEOC regulation on language use in the workplace.

Mr. KENNEDY. No, it does not.

Mr. DeCONCINI. Therefore, if S. 1745 is passed and signed into law by the President, the EEOC regulations would be consistent with title VII as amended by S. 1745.

Mr. KENNEDY. That is correct.

Mr. DECONCINI. I would like to thank my distinguished colleague from Massachusetts. That is all I have.

(....)